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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

□

RALPH HENRY CAHOON, JR., *Petitioner*

*v.*

UNITED STATES OF AMERICA, *Respondent*

□

## Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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# SUPREME COURT OF THE UNITED STATES

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RALPH HENRY CAHOON, JR., *Petitioner*

*v.*

UNITED STATES OF AMERICA, *Respondent*

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## Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

Ralph Henry Cahoon, Jr., petitions this court for a writ of certiorari. He shows unto the court as follows:

1. *Opinions of the court below.*

The original opinion of the United States Circuit Court of Appeals is reported at 152 F. 2d 752 and also appears in the record. [239-240] * The opinion of the court upon the petition for rehearing is not yet reported in the Federal Reporter, but also appears in the record. [261-263]

2. *Jurisdiction.*

The jurisdiction of this court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of

* Bracketed figures appearing in this petition and the supporting brief refer to pages of printed transcript of the record.

February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this court on May 7, 1934.

3. *Timeliness of this petition.*

The judgment of affirmance was rendered and entered January 9, 1946. [241] Time to file a petition for rehearing was enlarged until fifteen days after the decision of this court in *Estep* v. *United States*, No. 292, October Term 1945. [241] The petition for rehearing was filed February 15, 1946. [242] The petition was denied April 25, 1946. [261-263] Upon application duly made the time for filing petition for writ of certiorari was enlarged to and including June 15, 1946. The petition for writ of certiorari is filed within the enlarged time.

4. *Statutes and Regulations involved.*

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. §§ 301-318) are drawn in question here, as well as Sections 622.44, 622.51, 623.1 (c), 623.2, 627.24 (b), 627.25 and 629 of the Selective Service Regulations (32 C. F. R. 601.5 *et seq.*) promulgated by the President under said Act.

5. *Questions presented.*

(1) Is the classification of petitioner by the board of appeal, whose members considered a brief about Jehovah's witnesses prepared by a lawyer-member of the board of appeal, based upon a book—hearsay evidence—bought by such lawyer two years previously, which information was outside the record and file, a violation of the Act, the Regulations and the due process clause of the Fifth Amendment to the Constitution of the United States?

(2) Was the summary disposition of petitioner's appeal, and the denial of his claim for exemption as a minister of religion, because he was one of Jehovah's witnesses a

classification by the board of appeal based on prejudice and bias contrary to the Act, the Regulations and the due process clause of the Fifth Amendment to the Constitution of the United States?

(3) Does the undisputed evidence show, as a matter of law, that petitioner was denied due process of law by the administrative agency so as to require a dismissal of the indictment and a remand of the draft board file to the administrative agency for further proceedings not inconsistent with the Act and Regulations?

(4) Where the undisputed evidence shows that the board of appeal was prejudiced against petitioner and violated his rights to procedural due process by denying him a full and fair hearing, may he show in defense to the indictment that the administrative agency acted illegally and unconstitutionally, and that the order on which the indictment is based is void?

(5) Did the trial court err in holding, as a matter of law, and in charging the jury, that the determination of the administrative agency on whether petitioner was exempt from training and service as a minister of religion, was not a matter for the determination of the court or jury in defense to the indictment charging petitioner with defiance of the order to report for induction?

(6) Did the trial court err in refusing to hold, and in refusing the jury the right to consider, that the order on which the indictment was based is void, because petitioner is a minister of religion exempt from all training and service for the reason that it was made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) contrary to the undisputed evidence, (e) without support of substantial evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving petitioner of his rights and liberty without due process of law, and (h) in violation of the Act and Regulations?

(7) Did the trial court err by instructing the jury, in effect, to convict petitioner under the indictment, when he told the jury that there was no denial of a full and fair hearing and the issue of whether petitioner was exempt as a minister of religion was not for the court or jury to decide?

(8) Did the court below err in holding harmless and immaterial error the denial of due process of law by the trial court which held and instructed the jury that the action of the administrative agency was not a matter for consideration of the court or jury in defense to the indictment?

(9) Did the trial court err in refusing to charge the jury that it could consider petitioner's honest good-faith belief that he was exempt because a minister of religion and thereby could not take the oath of induction, as a defense to the charge that he knowingly, willfully and unlawfully refused to comply with the order?

(10) Does the undisputed evidence show that petitioner did not fail to report for induction as charged in the indictment?

## Statement of Case

### Form of Action

This criminal action was instituted in the District Court of the United States for the Southern District of Texas by return of an indictment charging defendant with violation of the Selective Training and Service Act of 1940, as amended, and the Regulations thereunder. [8]

The indictment charged that petitioner, a registrant classified for training and service in the armed forces "did knowingly, wilfully and feloniously fail and neglect to report and submit himself to induction into armed forces

of the United States, in accordance with the order of the Local Draft Board." [9] *

Thereafter petitioner pleaded "not guilty". [14] The trial to a jury before the court began on February 27, 1945. [10] The Government presented its case to the court and rested, where upon petitioner moved for an instructed verdict. [70-71] The motion was denied with exception to petitioner. [70, 71] Again, at the close of all the evidence, petitioner moved for an instructed verdict and again his motion was denied, with exception to him. [216-217] Then, after counsel argued the case, the court charged the jury. [218-222] A special charge which petitioner had timely requested was denied, with exception. [222-223, 225-226] The jury returned its verdict of guilty on February 28, 1945, and judgment was promptly pronounced thereon. [226-227] On March 1, 1945, the court entered final judgment, committing petitioner to the custody of the Attorney General for a period of 13 months. [228]

Petitioner then moved for a new trial, but this motion was overruled, with exception. [229-230]

Petitioner duly served and filed his written notice of appeal in the time and manner required by law. [236-237] He also timely filed his assignments of error which support each ground of this petition for writ of certiorari. [232-236]

## Facts

Cahoon, now 20 years of age, registered under the Selective Training and Service Act of 1940, on October 4, 1943, with Harris County Local Board No. 9, at Houston,

* This is substantially the same allegation that appears in the indictment returned against petitioner in Smith v. United States, No. 66 October Term 1945. See the record in that case, pp. 2-3. The record in this case shows that petitioner, like Smith, exhausted his administrative remedies by reporting for induction and refusing to take the oath. The court below considered that he exhausted his remedies, as did Smith and Estep. 66 S. Ct. 423.

Texas. [15, 20, 64] He was thereupon assigned order number 13708 by said board. [64] Petitioner timely filed a Selective Service Questionnaire on October 6, 1943, answering all the questions required of him. [28, 29-37] In series VIII he stated he was a minister of religion, did customarily serve as a minister and had been a minister of Jehovah's witnesses since August 1, 1936. [34] In said questionnaire he claimed classification of IV-D exempting him as a minister of religion under section 5 (d) of the Act. [35] Supporting this claim he filed with the board his own written statement giving details as to his ministerial work. [38-39] Also he attached an affidavit from K. K. Records, a minister of Jehovah's witnesses, attesting as to his training and status as a minister. [48] These two documents were received into evidence as Defendant's Exhibits 2 and 4.

Also filed by Cahoon was a Special Form for Conscientious Objector properly filled out, which contained additional evidence as to his training for the ministry and his activity as a minister. [50-53] Cahoon showed that he had attended the David G. Burnett Public Elementary School in Houston from 1934 to 1935 and that, in 1943, he had enrolled in a Course of Theocratic Ministry which was conducted by Jehovah's witnesses at Houston. [51] He also filed at the same time an "occupational questionnaire" in which he stated that his principal occupation was that of preaching the Gospel, and that secondarily he worked as a part-time stock clerk in a dry goods warehouse. [26]

The evidence showed that petitioner had undertaken a solemn covenant and vow as a minister of God in a ceremony held on August 1, 1936, at the First Congregational Church in Houston. [130-131] After his ordination he was given a certificate identifying him as one of Jehovah's witnesses and a minister of God. [173-176, 181] For some years previous to this ceremony, he had been making a deep study of the Bible and had consecrated his life to the ministry. [135, 159-160] Since the public ceremony of ordi-

nation on August 1, 1936, he lived up to his vows, preaching the gospel whenever he had opportunity and "living up to the tenets of the christian faith". [131, 168] However, since he had no private income or fortune and since his ministry was conducted on a non-profit basis, he found it necessary to devote part of his time to a secular occupation. [132, 133] Such secular occupation did not interfere with his preaching activities, he being able to devote approximately 30 hours per week to actual preaching as a regular minister of religion. [132]

Petitioner preached the gospel in the same manner as did Christ Jesus and His apostles, that is, by going from door to door and village to village, telling the people of and concerning the Kingdom of God. Many persons desired studies in the Bible conducted in their homes, and he arranged for and conducted a number of such studies. [39, 138] Additionally he gave discourses to the congregation of Jehovah's witnesses with which he was affiliated. [138] In May 1944 he was appointed by the Watchtower Bible and Tract Society in Brooklyn, New York [163], as presiding minister over the Sunday evening services held at Kingdom Hall on North Main Street, the congregational headquarters. [139] Approximately 150 to 200 persons usually attended this service for public worship. [171]

A number of persons testified as to the ministerial status of petitioner. His mother and father testified that they had raised their son up "in the nurture and admonition of the Lord" to be a minister. [154, 158, 160] Mr. and Mrs. Rigby said that they recognized him as a minister because of his service and relationship to the congregation. [169, 171] Lyman Dean, a direct representative from the Watchtower Bible and Tract Society in Brooklyn, New York, declared that the records of the church showed that petitioner had been serving in the capacity of a minister since 1936. [179] A. H. Knovel said that he had lived in Houston for 56 years and was fully acquainted with the background and

ministerial work being done by petitioner and that by virtue thereof he recognized him as a minister. [185] R. O. Conoley testified that he had known petitioner since his birth and that in view of his training in the Word of God and his faithful service, he recognized him as a minister in the church. [197, 199] K. K. Records, presiding minister of one of the congregations of Jehovah's witnesses in Houston, said that petitioner became a minister after his ceremony of baptism in August 1936, since which time he had diligently carried forward the work of the ministry in the church. [202, 203] Michael Kierssak said that he knew that petitioner was recognized by the church as a minister and that he had been personally associated with him in the performance of some of his ministerial duties. [208-209] Mary Elizabeth Brown testified that she was a Roman Catholic, and a neighbor of petitioner. She said that she observed him to be very active in his ministerial work and that he was recognized by Jehovah's witnesses as a minister. [216]

There was no evidence in his file disputing the evidence and claim that he was a duly recognized minister of religion, representing a religious organization known as Jehovah's witnesses and, as its legal governing body, the Watchtower Bible and Tract Society. There was no evidence that the defendant did not fit, as a minister of religion, Opinion No. 14 of National Headquarters of Selective Service System concerning the ministerial status of Jehovah's witnesses [56-60]; that he did not stand in relation to Jehovah's witnesses in the same way that the recognized orthodox clergy stand toward their congregations; that he did not perform ceremonies that are ordinarily performed by ministers of religion under the Act. This was freely admitted by the draft board officials who had handled his case. [77, 103, 110, 125]

The local board denied his claim for exemption on October 28, 1943, and placed him in Class I-A, making him

liable for training and service in the armed forces. [16, 36] The two members of the local board who testified in his behalf at his trial stated that they recognized the good faith of the claim for ministerial exemption made by petitioner, but that his qualifications did not measure up to the standard of their interpretation of what constituted a minister. [75, 78, 82] Petitioner then requested the privilege of appearing personally before the local board to discuss his classification and to present further evidence, which request was granted. [76] At this hearing he made a formal statement to the board. [54, 77] The board then changed his classification to I-A-O, which made him liable for noncombatant military service. [16] He thereupon appealed his case to the Board of Appeal for the Fourth District. [15, 36] On December 17, 1943, the board of appeal determined that Cahoon was not exempt or deferred for training and service, thus making it necessary to refer the case to the Department of Justice for investigation of his status as a conscientious objector. [36, 101] The file was sent to the Department of Justice for investigation of his status as a conscientious objector. [98] A Hearing Officer of the Department of Justice investigated and examined defendant and reported that "undoubtedly registrant is a minister within the meaning of the law. He performs all the essential functions of a minister". [46] However, petitioner waived his right to be classified in IV-E as a conscientious objector because his claim was exclusively for IV-D, minister of religion. [100]

On return of the file from the Department of Justice the board of appeal proceeded to reconsider the merits of his claim for exemption, inasmuch as he waived classification as a conscientious objector. [101] The chairman of the board of appeal stated the procedure of reconsideration to be that the board went through the file and read part of it together with a brief containing excerpts of the file prepared by the clerk. [98] The members of the board

read what part of it they wanted to read in reviewing the file. [98] Petitioner's claim for exemption from training and service, as made in his questionnaire, was read and considered. [99] Other evidence in the file was weighed by the board of appeal. [100] The chairman stated that there was no evidence before the board of appeal to indicate that petitioner was not a minister of religion as he claimed. [103] He stated that there was nothing to indicate that, in making his claim, petitioner was motivated by cowardice or selfishness. [103] He stated that the board did not think petitioner was a minister. [105] The reason was that the members of the board of appeal, in their own minds, did not believe he was a minister of religion. [106] One of the reasons advanced by the chairman for denying petitioner's claim for exemption was that petitioner had a part-time secular job as a clerk. [108] It was conceded that there was nothing in the cover sheet to indicate that petitioner was not truthful in his representations made in the cover sheet. [109] The members of the board of appeal were not able to define a "minister of religion" because of the variations in the different denominations and religions. [112]

The vice-chairman of the board of appeal testified that in consideration of the petitioner's claim for exemption the board considered information which they had outside of petitioner's file on which their conclusions were based. [116-117] Several years before petitioner's file was considered by the board of appeal, the vice-chairman prepared a brief on the ministerial status of Jehovah's witnesses, presenting an elaborate and extensive argument against their classification as ministers, which he gave to the members of the board of appeal. [118] In the brief, he reviewed certain scriptures upon which he placed his private interpretation, concluding that there were different classes of ministers and that from a Bible standpoint all members of a religious organization could not be ministers. More-

over, he showed what the practice was in the orthodox religious organizations with which he was familiar in reference to most of the members being lay members being served by a minister for each congregation. [117] This written argument briefing the question was circulated among all the members of the board of appeal two years or more before petitioner was classified by the board of appeal. [118] Although a copy of such brief was not placed in petitioner's file, its contents was considered and followed in consideration and determination of petitioner's classification. [118] When the board discovered that the petitioner was "a member of Jehovah's witnesses", it was immediately concluded upon the basis of the memorandum of the vice-chairman that petitioner was "just like a layman of some other church, or a sect". [120] Since petitioner was a member of an organization that claimed all its members were ministers, it was concluded that petitioner was not a minister of religion within the meaning of the Act and Regulations. [121] The written memorandum did not concern the petitioner. It was not written by petitioner. It concerned all of Jehovah's witnesses, as viewed by the vice-chairman of the board of appeal. [119] The memorandum caused petitioner to be considered, not as an individual but as a member of a class which class was considered not to be ministers. [119] It was concluded that inasmuch as petitioner was not a member of "the Bethel family or a member of the pioneers which are exempt under Hershey's order on November 2, 1942, and no evidence in the file being there as having his name on that list, that he was just a lay member who like all other religious organizations went around preaching and talking and trying to persuade others to their line of faith." [117] Therefore the evidence in the file was not considered as the only basis for the conclusion that petitioner was not a minister of religion. [116-117] The information which the vice-chairman had obtained in the book that he bought in St. Louis regarding

the group had its effect upon the decision in petitioner's case. [120] If petitioner had been a member of some other religion and "had a big Church on the corner", the same decision would not have been reached. [120-121, 121-122] Presumably the contents of the memorandum was considered by the members of the board of appeal because it was distributed to all of them. [118] *

The board of appeal, on August 28, 1944, denied petitioner's claim for exemption and classified him liable for training and service in the armed forces. He was given Class I-A. [17, 36, 101] No further appeal was allowed from the decision of the board of appeal. However petitioner wrote the State Director of Selective Service at Austin, Texas, requesting his intercession to review the determination. [101-102] The State Director declined to intervene in petitioner's behalf and on December 5, 1944, petitioner was ordered to report for induction on December 15, 1944, at 8 a.m. [17, 23] At the time and place specified in the order, petitioner reported for induction but refused to submit to induction and refused to take the oath, giving as his reason therefor that he had "conscientious scruples against serving in the armed forces" because he claimed exemption as a minister of religion. [17, 18] Subsequently he was arrested and charged with a violation of the Selective Training and Service Act of 1940, as amended.

## How Issues were Raised

The trial court, with exception to petitioner [72, 217] overruled his motions for instructed verdict filed at the close of the Government's case [71] and again at the

* Although one member of the board stated that he considered and read the brief prepared by the vice-chairman [124-125] he stated that it had no influence on his decision of the case at all. [125] It should be observed, however, that this member reached the same conclusion as did the vice-chairman in his brief based on conversation this member had with other persons which was also hearsay evidence of which a memorandum did not appear in the file. [125-126]

close of the evidence, by which motions petitioner presented his contention that the evidence produced against him was insufficient as a matter of law to sustain a judgment of conviction and that there was no evidence of an evil, malicious or otherwise criminal intent. [217-218]

Although the jury was permitted to receive and consider the draft board file and much *de novo* evidence offered by petitioner, the trial court withdrew all of such evidence from the consideration of the jury through his charge. The jury was instructed, as a matter of law, that petitioner had been accorded a legal and constitutional treatment by the administrative agency. [221] Moreover the trial court charged the jury that it was absolutely and finally bound by the finding of the administrative agency. The jury was informed that it could not consider whether or not the administrative agency had acted without foundation of fact, in excess of its jurisdiction, unlawfully, arbitrarily or capriciously in denying petitioner his claim for exemption as a minister of religion. [220-222] The petitioner duly excepted to this charge because it amounted to an instruction of guilty and a verdict for the Government. [222] He further excepted to the court's charge depriving him of his rights under the law. [222-223] A further exception was made on the grounds that it deprived him of his right of appeal and freedom of religion and conscience contrary to the Constitution of the United States. [223] The court's charge, petitioner said, made the findings of the board of appeal final from which there was no appeal under the law on a record showing indisputably that he was a minister of religion as defined by law and which showed that there was no evidence that he was not such a minister as claimed, and it was therefore excepted to. [224] The court's charge was attacked because it deprived petitioner of his right to a jury trial and to defend himself against the indictment and to show that he was not guilty. [223, 224] Moreover, petitioner excepted to the charge because the jury was not

instructed as requested by petitioner that it could consider his good faith and conscientious belief that his covenant with Almighty God prevented him from submitting to induction because a minister of religion. [223] The special requested charge was duly submitted in writing by petitioner to the trial court. [222] Petitioner's special requested charge appears in the record. [223, 225-226]

Each and every one of the issues raised upon the trial were again urged to the trial court in petitioner's motion for new trial. [229-230] The motion for new trial was overruled, with exception to petitioner. [230] Each and every one of the issues raised upon the trial were brought forward to the Circuit Court of Appeals by assignments of error duly filed. [233-236]

## Specifications of Error

Petitioner relies upon each and every one of his assignments of error as grounds for reversal of the conviction.

## Reasons Relied on For Granting the Writ

The holding of the court below is in direct conflict with the holding of this Court in *Estep* v. *United States* and *Smith* v. *United States,* 66 S. Ct. 423, 425-429. The specious efforts to circumvent the decision in the *Estep* and *Smith* cases on the ground that the trial court properly applied the law of the *Estep* and *Smith* cases is without foundation in fact, contrary to the record and the law promulgated by this Court in the *Estep* and *Smith* cases. There is no distinction between those cases and the one at bar. The decision of the court below flouts the *Estep* decision of this Court.

Insofar as the holding of the court below overrules the contention of petitioner that the action of the board of appeal in depriving him of a full and fair hearing, the

decision is in conflict directly with the holding of this Court in *Bridges* v. *Wixon,* 326 U. S. 135, 156-157. Moreover, on this point the decision of the court below also conflicts with *United States ex rel. Levy* v. *Cain* (CCA-2) 149 F. 2d 328 and *Pearson* v. *United States ex rel. Horowitz* (CCA-3) 151 F. 2d 801, certiorari granted *sub nom Hobbs* v. *United States ex rel. Horowitz,* No. 947, October Term 1945, 14 L. W. 3419, May 27, 1946. Inasmuch as this case presents to the Court substantially the same question of procedural due process as is presented to the Court in the *Horowitz* case, in which the writ of certiorari has been granted, the writ should be granted in this case for the same reason.

The members of the board of appeal were prejudiced, reached a preconceived opinion about the ministerial status of all of Jehovah's witnesses, and classified petitioner as a result of bias, in violation of the Selective Service Regulations. The approval of this drastic departure from the usual and accepted course of administrative law, calls for the exercise of the power of supervision by this Court to halt the same and to correct the injustice committed against petitioner.

The approval by the court below of the trial court's refusal to grant petitioner's requested instruction asking the court to permit the jury to consider the good faith of the petitioner in determining whether or not he wilfully and unlawfully violated the law in refusing to submit to induction is directly in conflict with the decision of the United States Circuit Court of Appeals for the Tenth Circuit in *Okamoto* v. *United States,* 152 F. 2d 905, decided December 26, 1945, and the decision of this Court in *Keegan* v. *United States,* 325 U. S. 478, 493-494; *United States* v. *Murdock,* 290 U. S. 389, 394-396.

## Conclusion

WHEREFORE your petitioner prays that this Court issue a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit directing such court to certify to this Court for review and determination on a day certain to be therein specified, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and petitioner further prays that the judgment of said Circuit Court of Appeals, affirming the judgment of conviction entered by the District Court be here set aside and petitioner dismissed from custody or, in the alternative, the judgment be reversed and the cause remanded for a new trial not inconsistent with this Court's opinion; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper in the circumstances.

RALPH HENRY CAHOON, JR., *petitioner*

By HAYDEN C. COVINGTON

*Counsel for Petitioner*

## SUPPORTING BRIEF

*Preliminary*

For a statement as to the opinion of the court below, the basis on which the jurisdiction of this Court is claimed, the questions presented, the history of the action, how the issues were raised, the evidence received and rejected and the assignments of error relied upon, reference is here made to the foregoing petition for writ of certiorari.

## ARGUMENT

The board of appeal departed from the Act and Regulations governing procedure in handling petitioner's case. The members of that board considered hearsay evidence received by one of the members which was reduced to writing and circulated among the members. However the memorandum was never placed in petitioner's file. The evidence received did not relate to petitioner. It related to Jehovah's witnesses in general. The authenticity and source of the material is not revealed. The action of the board in this respect comes squarely within the rule laid down in the cases of *United States ex rel. Levy* v. *Cain* (CCA-2) 149 F. 2d 328 and *Pearson* v. *United States ex rel. Horowitz* (CCA-3) 151 F. 2d 801, certiorari granted *sub nom Hobbs* v. *United States ex rel. Horowitz,* No. 947, October Term 1945, 14 L. W. 3419, May 27, 1946.

In reviewing an appeal, the board of appeal is forbidden by the Regulations to "receive or consider any information which is not contained in the record received from the local board, except (1) the advisory recommendation from the Department of Justice under Section 627.25, and (2) gen-

eral information concerning economic, industrial and social conditions." Reg. 627.24 (b).

Inasmuch as the action of the board of appeal is *de novo* it is necessary that the file reflect the basis upon which the classification was rendered. Petitioner in this case did not know upon what basis he had been classified until his lawyer began examining the members of the board of appeal at the trial. Inasmuch as the board of appeal had made the basis of its determination on the memorandum prepared by the vice-chairman of the board, it was necessary that the material be placed in petitioner's file. Concededly that was never done. This defalcation of the board of appeal is a plain violation of the Regulations. As a matter of fact, the Regulations do not provide for the board of appeal to consider any information of any kind or character acquired by a member of such board about the status of a registrant. The local boards were set up for that purpose. Section 627.24 (b) of the Regulations explicitly prohibits the receipt and consideration by the board of appeal of "*any information* which is not contained in the record received from the local board." The only exception to this rule permitted by the Regulations is that the recommendation from the Department of Justice as to a registrant's status as a conscientious objector may be considered. This recommendation from the Department of Justice was filed and considered by the board of appeal in this case. [41-47, 113]

The Regulations also provide that the board of appeal may consider "general information concerning economic, industrial and social conditions." Section 627.24 (b) allowing consideration of these factors is limited to such information as to industrial statistics directly bearing upon the eligibility of registrants seeking occupational deferments in class II-B (man in war production) covered by section 622.22, agricultural statistics in determining whether or not farm deferments should be granted to certain

registrants claiming class II-C (man in agriculture) covered by section 622.25-1, or social conditions might be considered by the board as determining factors in deciding whether or not a registrant was entitled to class II-A, the classification given to registrants found "to be 'necessary to and regularly engaged in' an activity in support of the national health, safety, or interest", as covered by section 622.21. But nothing could be more certain than that this exception is not intended to open wide the door to allow any and all hearsay evidence or prejudicial argument to be considered by the appeal board. It is very obvious that a man's exemption as a minister is not dependent upon economic, industrial or social conditions of the community. Such classification is to be rendered solely on the basis of the registrant's devotion to Almighty God and his activity in behalf of his church. In any event, the requirement of section 623.2 that any evidence considered must be reduced to writing is still mandatory. Thus if the appeal board based its conclusion on evidence not in the file—even though its consideration of such evidence was legitimate—it is required to reduce it to writing and put it in the Cover Sheet. Otherwise, in the event an appeal is taken to the President, the basis of the determination of the appeal board would not be reflected from the file and the registrant would be deprived of substantial rights under the Act.

Although in this case an appeal as of right could not have been taken to the President, petitioner's title to constitutional due process was nevertheless infringed because he was not given a fair and impartial hearing before the appeal board and because improper, prejudicial and incompetent evidence was made the basis of his classification in the place and stead of the information contained in his Cover Sheet.

Although the Regulations do not permit a personal hearing before the appeal board, they do contemplate a full and fair consideration of the evidence *in the file*. In

considering this evidence and in making its determination thereon, the board is acting in a quasi-judicial capacity. Its determination of the issue of classification is an important proceeding. An important and substantial right of petitioner under the Act and Regulations is to be determined.

The reception of secret and anonymous evidence in this case is very similar to the conduct of a public utilities commission condemned by Justice Cardozo in *Ohio Bell Tel. Co.* v. *Public Utilities Commission* (1937) 301 U. S. 292, 300, 302, 303: "Without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted, the Commission cut down the values for the years after the date certain upon the strength of information secretly collected and never yet disclosed. The company protested. It asked disclosure of the documents indicative of price trends, and an opportunity to examine them, to analyze them, to explain and to rebut them. The response was a curt refusal. . . . The putative debtor does not know the proofs today. This is not the fair hearing essential to due process. It is condemnation without trial. . . .

"From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. . . . The opportunity is excluded here. The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms."

Thus papers in the appeal board's files cannot be con-

sidered as evidence in every case: it cannot take judicial notice of them. It must introduce, by specific reference, parts of reports, etc., filed with it which it wishes to treat as evidence. Otherwise, while the data may be trustworthy, Selective Service registrants are left without notice of evidence.

There is no escape from the fact that the anonymous book and the memorandum of the vice-chairman of the appeal board influenced the decision of that agency. [120] To what extent, it is impossible to say. This brings the case squarely within the rule of the Supreme Court of the United States in *Bridges* v. *Wixon*, 326 U. S. 135, 156, where it is said:

" . . . The alien does not prove he had an unfair hearing merely by proving the decision to be wrong . . . or by showing that incompetent evidence was admitted and considered. . . . But the case is different where evidence was improperly received and where but for that evidence, it is wholly speculative whether the requisite finding would have been made. Then there is deportation without a fair hearing. . . . "

The reception of improper evidence was one of the things condemned by the Supreme Court of the United States in *Morgan* v. *United States*, (1936) 298 U. S. 468, 479-481, wherein the Chief Justice Hughes said:

" . . . It is a duty which carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. . . . Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. . . .

" . . . The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts.

The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

Whether a hearing is fair must be determined by the character of the hearing and not by that of the classification based thereon. This question is open to full judicial inquiry and is in no sense concluded by assertion of the administrative agency in question that a fair hearing was given. In this case the undisputed evidence before the lower court showed that the appeal board had received grossly incompetent and prejudicial evidence. Thus it was the duty of the trial court to instruct the jury to acquit petitioner.

Section 623.1 (c) provides: "In classifying a registrant there shall be no discrimination for or against him because of his race, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each registrant shall receive equal and fair justice." In this case, defendant was discriminated against and was treated unfairly because he was one of Jehovah's witnesses. The members of the board testified that in looking over defendant's file it was "discovered that he was a member of Jehovah's witnesses," and it was this discovery that apparently was responsible for the I-A classification given petitioner. Under the circumstances, this hearing amounted to no hearing at all under the Act and Regulations.

The testimony of members of the appeal board indicated that they were prejudiced against Jehovah's witnesses and were biased in their conclusions. Vice-chairman Morris had

already reached his conclusions on the basis of the information he obtained from the book he had purchased. [120] Dr. John T. Moore said that he had previously received information concerning Jehovah's witnesses by talking to persons who had conversed with Jehovah's witnesses and by talking to them himself.

A hearing by a biased judge or board is not in conformity with due process of law which implies a tribunal board impartial and mentally competent to afford a fair hearing. The undisputed evidence in the record shows that the appeal board was not non-partisan, nor was it free from bias and prejudice. Defendant's case was considered and determined on the reputation of Jehovah's witnesses rather than upon own merits of his own case. This in itself is a substantial denial of due process.

The record showed that petitioner was a regular and duly ordained minister of Jehovah's witnesses and the Watchtower Bible and Tract Society, Inc., recognized religious organizations. The undisputed evidence showed that he regularly performed his duties as such, devoting approximately thirty hours per week to regular teaching and preaching of the doctrines of Jehovah's witnesses. He stood in relation to the local congregation of Jehovah's witnesses in the same way as did the clergy of the orthodox religious denominations. In addition to preaching sermons regularly, he performed missionary evangelistic work.

The administrative agency cannot arbitrarily determine that one is not a minister of religion, even though of an unorthodox and dissentient faith, if he is recognized by his organization as a regular or duly ordained minister, and there is no substantial evidence that he fictitiously claims to be a representative of the organization or that he is not such a minister, or that he is not so recognized. It is the mandatory duty of the draft boards to recognize such ministerial status and to grant exemption allowed by the Act and Regulations for ordained ministers of religion.

*Ex parte Cain,* 39 Ala. 440, 441; *In re Reinhart,* 9 Ohio S. & C. P. Dec. 441, 445; *Town of Londonderry* v. *Town of Chester,* 2 N. H. 268; *Kidder* v. *French,* N. H., Smith, 155, 156; *Haggin* v. *Haggin,* 53 N. W. 209, 211, 35 Neb. 375; *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Baldwin* v. *McClinch,* 1 Mo. (1 Green) 102, 107. *Lehr* v. *United States,* 139 F. 2d 919, 921-922.

This point has been exhaustively argued in the joint brief for petitioners in *Smith* v. *United States,* No. 66 October Term 1945, and *Estep* v. *United States,* No. 292, October Term 1945, at pages 130-190, to which reference is here made. That argument is incorporated here as though copied at length herein.

At the close of all the evidence the defendant moved the court for a directed verdict of "not guilty", for various reasons. [216-217]

It is a fundamental rule that if the undisputed evidence shows that defendant is not guilty of the offense charged and upon another trial the evidence would be substantially the same or could not be different, it is the duty of the appellate court to reverse, set aside the verdict, and render a judgment that the indictment be dismissed, rather than to set aside the verdict and order a new trial. This is especially true where the court below does not have jurisdiction. *A fortiori,* if the local board, upon whose order the indictment is based, is without jurisdiction, the rule would be the same. This case is therefore governed by *Smith* v. *United States,* 150 U. S. 50, and *Baltimore Carolina Line* v. *Redman,* 295 U. S. 654.

The efforts on the part of the court below to hold as harmless error the action of the trial court in striking all of the evidence received in respect to the illegality of the administrative action from consideration of the jury and in charging the jury that it could not consider the illegality of the administrative determination and the denial of a full and fair hearing is erroneous. The court below at-

tempted to hold that such action was harmless error because the trial court followed the rule in reference to the scope of judicial review of draft board determinations in *Estep* v. *United States,* 66 S. Ct. 423. The trial court did not follow the rule of this Court announced in *Estep* v. *United States.* To the contrary, the trial court followed the rule of *Falbo* v. *United States* (320 U. S. 549), which conclusion was erroneous and prejudiced the petitioner. It cannot be said that the action of the trial court was harmless error. It was prejudicial error for the court below to hold that the action of the trial court was harmless to petitioner. A similar effort was attempted by the court of appeals in the case of *Smith* v. *United States,* 148 F. 2d 288. (See the last point discussed in that opinion.) This Court reversed the judgment in the *Smith* case because the trial court refused to exercise its judicial function. There the trial court failed to pass upon the issue raised. It refused to permit the jury to consider the issue. The questions for determination by the court and jury were limited to whether or not the defendant complied with the order. The same failure to exercise the judicial function is prevalent here. The trial court did not pass upon the merits of petitioner's defense. Therefore this case should be reversed and sent back for a new trial just like the *Smith* case was reversed and sent back for a new trial.

Even if no error was committed by the trial court in denying petitioner's motion for directed verdict, nevertheless the action of the court, in striking all the testimony received upon the trial with reference to denial of a full and fair hearing and the classification in excess of the jurisdiction of the board of appeal, from the consideration of the jury was reversible error and entitles the petitioner in this case to a new trial. The error concurred in by the opinion of the court below is satisfactorily answered by the concluding language of the opinion of the Court in *Estep* v. *United States* (66 S. Ct. 423, 429): "Since the petitioners

were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case."

The trial court permitted the petitioner to testify extensively as to his reasons for not submitting to induction. He said that since he was a minister of religion and that ministers of religion were exempt from training and service, he believed the order of the board to be void and that he could not be required to submit to induction. He further said that as a faithful servant of Almighty God he could not break his covenant with Jehovah God by discontinuing preaching in his congregations, because such would result in his everlasting death. [146-148]

The term "knowingly" as used in the Selective Training and Service Act is synonymous to the word "wilfully". It does not mean "voluntarily" or "unintentionally". It means prompted by a bad faith or with an evil intent or for an illegal purpose. It means without legal justification. If the petitioner had legal justification or reasonable grounds for belief that he was legally justified in not submitting to induction, then it cannot be said that he illegally, knowingly, and unlawfully failed to perform a duty required of him under the Act.

The petitioner requested the court to instruct the jury to consider his good-faith belief that he was not required to submit to induction, that he was exempt from all duty under the Act and that the order was void. [222, 225] The court refused the special charges. [222] The petitioner excepted. [222] The court held that the honest good-faith belief of the petitioner was not material as defense to the indictment.

The petitioner relies on *Keegan* v. *United States,* 325 U. S. 478, 493-494, to support the proposition that the jury should have been charged to consider his good faith as requested in the special requested instruction. Petitioner had to report in order to exhaust his administrative rem-

edies. His refusal to take the oath was based on his belief that he was not required to submit to induction and that he could not do so without violating God's law. "One with innocent motives, who honestly believes a law is unconstitutional and, therefore, not obligatory, may well counsel that the law shall not be obeyed." *

In support of this proposition petitioner also depends upon *United States* v. *Murdock*, 290 U. S. 389, 394-396. There the defendant was convicted for wilfully and knowingly failing to supply information as to his income. The grounds for the refusal were that he believed he was exempt on the items inquired about and that the Constitution guaranteed him the right to decline to incriminate himself. This reasonable belief of exemption, which was erroneous, and the fear that he might incriminate himself, entitled the jury to consider that if he had good faith he could not be convicted of wilfully refusing to give the information.

If a selectee is ill, had an accident, was prevented by storm from appearing or by mistake, he could show that in defense. (*United States* v. *Hoffman* (CCA-2) 137 F. 2d 416; *United States* v. *Grieme* (CCA-3) 128 F. 2d 811) Similarly, good-faith belief that the order is invalid is also permissible as a defense.

On the whole record, it appears that petitioner reported for induction but refused to submit to induction. The indictment charged petitioner with "failure to report and submit himself to induction". [9] The clerk of the local board testified that the records showed that petitioner reported for induction on December 15, 1944, as commanded but that he did not submit himself to induction. [17] A written statement made by the assistant clerk, which is a part of the draft board file, shows that petitioner "did present himself at this Board at the specified time. He refused, however, to be inducted, for the reason that he

* See also Okamoto *v.* United States (CCA-10) 152 F. 2d 905.

has conscientious scruples against serving in the armed forces, and he claims exemption as a minister of the gospel." [18] The clerk further testified that petitioner "appeared and passed the physical examination and was duly accepted, physically". [24] Petitioner testified that he appeared at the time and place stated in the order to report for induction. [46] He stated that he knew he was ordered to do general military service. [146-147]

In response to his counsel in the trial court he declared he could not take the oath: "Q. What is the reason why you did on that occasion fail and refuse to take the oath and thereby submit yourself to induction? A. Because I previously made an oath or consecration of my life to Almighty God and I could not go back on that oath because that was an eternal oath; an oath I could not reject. Q. Could you at that time have taken the oath as a member of the Army of the United States in good faith as to the United States? A. No. I could not." [147]

In response to the questions propounded by the prosecuting attorney in the trial, he stated that he was ordered to report for induction: "Q. Did you receive that order? A. I did. Q. Did you report for induction as ordered? A. I reported, yes, sir. Q. Did you submit yourself to induction? A. No, sir, I did not." [150]

The court charged the jury: "it is not insisted by the defendant that he appeared for the purpose of being inducted into the army because he said he did not intend to be inducted when he went there. So that I will repeat again, that if you find under this order which I charge you is a vaild and legal order, that he failed to appear to be inducted into the army, he would be guilty under the indictment." [222]

It is presumed that there was a regularity of administrative proceedings following the issuance of the order to report for induction and that the petitioner complied with Sections 623.21 and 633.22 and reached the point where he

could be required to submit to induction, because unless he was ever ordered to submit to induction it cannot be said that he refused to submit to induction.

There is nothing in the record to dispute the statements of the various witnesses and the documents that petitioner refused to submit to induction and that he was duly accepted for training and service. It is at least enough evidence to warrant this Court in holding that the petitioner did precisely as did Estep and Smith.

However, if it is assumed upon the record in this case that petitioner went no further than the local board and actually refused to report for induction, then, nevertheless, he completed the selective process and exhausted his administrative remedies when he was accepted by the armed forces for training and service upon his preinduction physical examination. One who has been accepted by the armed forces upon a preinduction physical examination has exhausted his administrative remedies so as to qualify for judicial review.

Section 3 (a) of the Selective Training and Service Act of 1940 (50 U. S. C. A. App. § 303) in part provides: " . . . no man shall be inducted . . . until he is *acceptable* to the land or naval forces . . . and his physical and mental fitness for such training and service has been satisfactorily determined." (Italics added) *

The administrative process beginning "with registration with the local boards" ends "when the registrant is *accepted* by the Army, Navy or civilian public service camp." *Falbo* v. *United States,* 320 U. S. 549. Section 629.1 of the Regulations provides that every registrant must be given a preinduction physical examination.

"The Selective Service Regulations also draw a distinction between acceptance (or being found acceptable) by the Army and induction." (*Billings* v. *Truesdell,* 321 U. S. 542, 553)

* Billings v. Truesdell, 321 U. S. 542, 546.

"These regulations thus suggest that induction follows acceptance and is a separate process." (*Ibid.* p. 554)

"This takes the place of the earlier system whereby selectees were first inducted and then given, if they desired, furloughs to attend to their personal affairs." (*Ibid.* p. 555)

"We mention these recent regulations because they perpetuate the distinction between acceptance or being found acceptable and induction which appeared in the regulations when Billings reported at the induction station." (*Ibid.* p. 555)

The matter of acceptance upon a preinduction physical examination terminating the selective process and constituting an exhaustion of the administrative remedies has been thoroughly discussed in other cases filed with this Court. See the petition for writ of certiorari in the case of *George William Dodez* v. *United States of America,* No. 1103 October Term 1945 (certiorari granted May 6, 1946, 14 L. W. 3386), pages 13-18; brief for petitioner in *Taze Hamrick Gibson* v. *United States of America,* No. 221, October Term 1945, pages 16-24.

It is acceptance by the armed forces that completes the selective process. One who has been accepted by the armed forces has exhausted his administrative remedies so as to qualify for judicial review. *Estep* v. *United States,* 66 S. Ct. 423. That acceptance constitutes the end of the selective process (and was so considered by the Court in the *Estep* case), as exhausting administrative remedies, is exemplified in the concurring opinion of Mr. Justice Frankfurter, where he said: "The command of Congress makes the decision of the board no less final after the registrant has submitted to the pre-induction examination than before such submission." It must be conceded that petitioner took the preinduction physical examination and had been accepted by the armed forces for training and service.

Assuming, for the purpose of argument only, that the record in this case does not show that petitioner went as far as did Smith and Estep and, also assuming, *arguendo,* that acceptance upon a preinduction physical examination does not constitute an exhaustion of the administrative remedies—which petitioner contends does exhaust the administrative remedies—sufficiently to entitle him to challenge the legality of the classification under the doctrine of the *Estep* decision, there is, nevertheless, a different problem presented here.

The error of the appeal board in considering improper and prejudicial evidence constitutes a substantial denial of the right upon appeal. The act of the appeal board was a denial of due process and was tantamount to an outright denial of his right of appeal. Therefore the order upon which the indictment is based is void the same as if no order had been issued at all. Under these circumstances the courts have held that the illegality of the order can be considered in defense to the indictment and that the doctrine of *Falbo* v. *United States supra* does not apply. *Tung* v. *United States* (CCA-1) 142 F. 2d 919; *United States* v. *Peterson* (USDC-ND Calif.) 53 F. Supp. 760; *United States* v. *Lair* (USDC-ND Calif.) 52 F. Supp. 393. Cf. *Ex parte Stanziale* (CCA-3) 138 F. 2d 312. It should be observed in the *Tung* case that the Government accepted the decision of the First Circuit as the law by not applying for ceritorari which was available to it.

The conviction under the indictment being based upon undisputed evidence showing a violation of the rights of the petitioner under the Act, the Regulations and the Constitution, the court below should have reversed the judgment of conviction and ordered the indictment dismissed and petitioner discharged *or,* in the alternative, for procedural errors committed against petitioner by the trial court, ordered the cause remanded for a new trial.

## Conclusion

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers under the Judicial Code and the Rules of this Court. To that end the petition for writ of certiorari should be granted so as to correct the assigned errors committed; and petitioner further prays that the judgment rendered by the Circuit Court of Appeals and the District Court against petitioner be reversed and petitioner discharged or, in the alternative, that the judgments be reversed and a new trial ordered.

Respectfully submitted,

HAYDEN C. COVINGTON

*Counsel for Petitioner*

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SUPREME COURT OF THE UNITED STATES

October Term 1946

# No. 183

RALPH HENRY CAHOON, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## PETITIONER'S REPLY
## to Brief in Opposition

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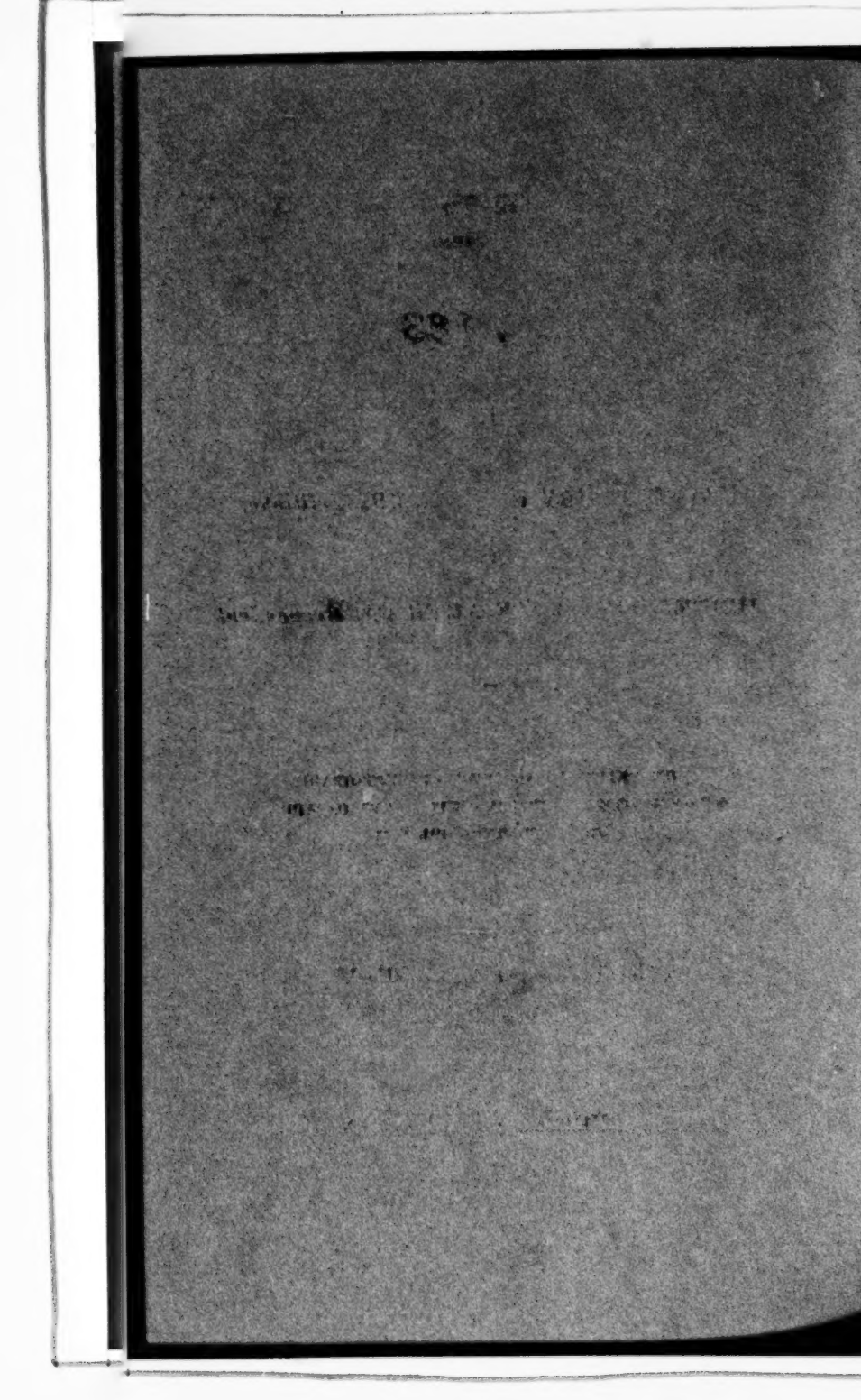

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# SUPREME COURT OF THE UNITED STATES

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## No. 183

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RALPH HENRY CAHOON, JR., *Petitioner*
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□

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
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## PETITIONER'S REPLY
## to Brief in Opposition

MAY IT PLEASE THE COURT:

The Government erroneously requests the court to hold that petitioner did not exhaust his administrative remedies so as to be able to challenge the validity of the draft-board order in response to the indictment. For this reason the Government says that the petition presents no question requiring further review by this court, because the holding in *Falbo* v. *United States* is applicable.

The Government misinterprets the Act and Regulations.

The *Falbo* decision is inapplicable because the Act and Regulations have been amended, changing the procedure since the *Falbo* decision. The Act and Regulations provide

for the predetermination of acceptability of the registrant before issuance of the order to report for induction, making inapplicable *Falbo* v. *United States,* 320 U. S. 549. Section 3 (a) of the Selective Training and Service Act provides, *inter alia,* " . . . no man shall be inducted for training and service under this Act unless and until he is *acceptable* to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined: . . . [Emphasis added]" 50 U. S. C. App. § 303 (a).

Section 4 (a) of the Act provides that when the induction of a registrant "will shortly occur" he shall, "upon request, be ordered by his local board . . . for a preinduction physical examination, subject to reexaminations."

"The commanding officer of such induction station where such physical examination is conducted under this provision shall issue to the registrant a certificate showing his physical fitness or lack thereof, and this examination shall be accepted by the local board, subject to periodic reexamination. Those registrants who are classified as I-A at the time of such physical examination and who are found physically qualified for military service as a result thereof, shall remain so classified and report for induction in regular order." (57 Stat. 599, 50 U. S. C. App. § 304 (a))

History of the amendment of the Selective Training and Service Act, as enacted December 5, 1943, shows clearly that Congress intended to eliminate entirely the process of determining acceptability of registrants ordered to report for induction into the armed forces simultaneously with their reporting for induction. It was the intention of Congress to have the acceptability of such registrants predetermined before the order to report for induction was issued. This was intended by Congress in order to alleviate the hardships and sufferings caused by possible rejection of men, who being ordered to report for induction, had wound up their personal affairs prior to reporting

for induction; and when thereafter, upon their rejection simultaneously with their reporting at the induction station, they would be compelled to return to their respective communities to begin life anew. (See 89 *Cong'l Record* 8079, Oct. 5, 1943.) The effect of this change in the Act was recognized by the court in *Billings* v. *Truesdell,* 321 U. S. 542, 554-555, where amendment to the Regulations is discussed.

By Amendment No. 200 (9 F. R. 440-442), effective January 10, 1944, the present procedure for preinduction physical examination was established. See Section 629 of the Selective Service Regulations. This procedure for preinduction physical examination by the armed forces was operative for registrants to be inducted into the armed forces.*

At the time Falbo reported for induction the Regulations prescribing the procedure for physical examination of registrants classified as liable for training and service in the *armed forces* did not provide for preinduction physical examination. The only examination given such registrants at such time by the armed forces to determine their acceptability for the land or naval forces was simultaneous with their reporting for induction. Thus prior to the amendment on December 5, 1943, it was necessary for one to report in order to exhaust his administrative remedies by undergoing the preinduction physical examination then given simultaneously with the registrant's reporting at the induction station pursuant to the order of the board. *Billings* v. *Truesdell,* 321 U. S. 542, 558-559.

At the time Falbo was ordered to report for *work of national importance,* however, the Regulations provided specifically for a *preinduction physical examination* to be

* This preinduction procedure, pursuant to the amendment to the Act, is more extensively discussed in the petition for writ of certiorari in Rinko *v.* United States, No. 1071, October Term 1944, at pages 25-34. It was specifically presented to the court in Flakowicz *v.* United States, No. 1072 October Term 1944; see petition for writ of certiorari, pages 16-18.

given *prior to issuance* of the order to report for work of national importance. (Regulations 651.7-651.9) See Government's brief in *Falbo* v. *United States,* No. 73 October Term 1943, pp. 44, 56, 107-108.

At the time Falbo was ordered to report there was no provision for the examination at the CPS camp of *all* registrants who were ordered to report for work of national importance. Examination at the camp was provided only for assignees who, upon reporting, indicated that there had been a change in physical condition since "the final-type physical examination for registrants in Class IV-E." (Reg. 653.11 (c)) See Government's brief in *Falbo* v. *United States,* No. 73 October Term 1943, pp. 56, 113.

Therefore the statement of the Government's brief in opposition in this case, that Falbo still might have been rejected had he reported at the CPS camp, is erroneous. See "Brief for the United States in Opposition", p. 8.

Moreover, the statement of this court in *Falbo* v. *United States* (320 U. S. 549, 553), that the conscientious objector could be rejected at the civilian public service camp, also is incorrect, being a misinterpretation of the Regulations.*

The Regulations did not provide for the examination of Falbo had he reported at the camp, unless he had experienced a change in physical condition. This would mean that unless he had been struck by lightning, run down by an automobile, or overtaken by galloping tuberculosis he certainly would be precluded from requesting a physical examination at the camp to determine anew his acceptability. Certainly the contingency of a change is too vague and indefinite to require every assignee to report to exhaust his administrative remedies.

* Because of this misinterpretation by the court of the Regulations in this respect, this court is being requested in the joint brief filed for petitioners in Gibson *v.* United States (No. 23 Oct. T. 1946) and Dodez *v.* United States (No. 86 Oct. T. 1946) to reconsider its decision in Falbo *v.* United States, 320 U. S. 549, and to declare that decision erroneous.

Inasmuch as Falbo had exhausted his administrative remedies, and since amendment of the Act in 1943 requiring preinduction physical examination for registrants ordered to report for training and service in the armed forces, it cannot be said that it was necessary for Cahoon to proceed to the induction station and undergo a second preinduction physical examination. The amendment to the Act and Regulations providing for the preinduction physical examination that preceded the issuance of the order to report for induction, when complied with by Cahoon effected fully exhaustion of his administrative remedies. His acceptability had been then finally determined. At that point, as to him, the selective process had been completed.

If the Government's argument is correct, then the purpose of Congress in enacting the amendment on December 5, 1943, and the purpose of the President in promulgating Section 629 of the Regulations in January 1944, will have been frustrated and vitiated. In fact, the construction that the Government attempts to induce this court to place upon the Act and Regulations repeals the amendments to the Regulations providing for the predetermination of a registrant's acceptability before issuance of the order to report. Certainly such important matters of policy and clearly expressed intentions of the Congress and the President cannot be expressly overruled by adoption of legerdemain construction proposed by the Government at this time for imposition upon the Act and Regulations.

This court's very act of granting the petition for writ of certiorari in *Dodez* v. *United States* (No. 86 Oct. T. 1946), which case is identical in every respect with the *Falbo* case, shows that this court did not intend to accept the construction the Government here proposes be placed upon the Act. If Falbo had not exhausted his administrative remedies, then Dodez had not. If Dodez had completed the selective process and exhausted his administrative reme-

dies[1] then by force of the same reason Falbo had completed the selective process. Since it is reasonably clear that Dodez had completed the selective process by taking the preinduction physical examination under the identical Regulations involved in the *Cahoon* case, it is also clear that Cahoon had exhausted his administrative remedies upon the completion of the selective process which was determined upon his submitting to the preinduction physical examination before the order to report for induction was issued.[2]

Inasmuch as the court granted the petition for writ of certiorari in the *Dodez* case, the court should grant the petition in this case. The instant case presents to this court a question similar to that presented in *Dodez* v. *United States,* No. 86 Oct. T. 1946. Since the questions urged in the *Dodez* case were deemed sufficiently substantial to justify granting of the writ, similar and correlative questions here presented should likewise be considered substantial enough to warrant the granting of the writ of certiorari prayed for by petitioner.

RALPH HENRY CAHOON, *Petitioner*

By HAYDEN C. COVINGTON
*Counsel for Petitioner*

July 25, 1946

[1] The Government concedes this. See its original brief filed in Gibson v. United States, No. 221 Oct. T. 1945, pp. 15-16, 17, 53-58.

[2] It should be observed that the court below in its opinion on petition for rehearing did not hold that petitioner did not exhaust his administrative remedies. In fact it assumed that he did and ruled against him on the theory that the errors committed by the trial court were harmless.

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702735—46

# In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 183

RALPH HENRY CAHOON, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The original opinion of the circuit court of appeals (R. 239–240) is reported at 152 F. 2d 752. Its opinion upon petition for rehearing (R. 261–263) is not yet reported.

### JURISDICTION

The judgment of the circuit court of appeals was entered on January 9, 1946 (R. 241), and a petition for rehearing (R. 242–249) was denied on April 25, 1946 (R. 263).[1] On May 23, 1946,

[1] The time to file the petition for rehearing was extended by the court below to 15 days after the decision of this Court in *Estep* v. *United States*, Nos. 66 and 292, O. T. 1945, decided February 4, 1946 (R. 241).

the time for filing a petition for a writ of certiorari was extended to and including June 15, 1946, by order of Mr. Justice Black (R. 264). The petition was filed on June 13, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

## QUESTIONS PRESENTED

1. Whether petitioner, who did not report to the induction station and was never found acceptable for service, may challenge the propriety of his Selective Service classification as a defense in his criminal trial for failing to report for induction.

2. Whether a registrant's belief that he should have been exempted as a minister of religion is a valid defense to a charge of "knowingly" failing to comply with an order to report for induction.

## STATEMENT

On January 10, 1945, petitioner was indicted in the United States District Court for the Southern District of Texas for failing to report and submit himself to induction into the armed forces of the United States, in violation of the Selective Training and Service Act of 1940 (R. 8–9). After a trial by jury, petitioner was convicted (R. 226–227), and was sentenced to imprisonment for 13 months (R. 228). Upon appeal to the Circuit

Court of Appeals for the Fifth Circuit, the judgment was affirmed (R. 241, 263).

At his trial petitioner predicated his defense on the ground that he was a minister of religion and that he had been improperly denied classification as such. He was permitted to adduce evidence in support of this contention (see R. 26–214).

The evidence in support of the judgment may be briefly summarized as follows:

Petitioner, a citizen of the United States (R. 34), registered under the Selective Training and Service Act of 1940 on October 4, 1943, with Local Board No. 9, Houston, Texas (R. 15). He executed his Selective Service questionnaire on October 6, 1943 (R. 29). In this questionnaire, petitioner stated that he was born on October 2, 1925 (R. 34); that his occupation was (a) preaching the Gospel from house to house and on the streets, conducting Bible studies and distributing Bible literature, and (b) working as a stock clerk in a local dry goods establishment (R. 30); that he earned nothing from his first occupational activity but averaged $25 weekly from the second (R. 30); that he was a minister of the Jehovah's Witnesses and had been since August 1, 1936,[2] but had not been formally ordained; that he was a student preparing for the ministry at the School of Theocratic Ministry in Houston, which was established after September 16, 1939 (R. 34); and that he

[2] At this date petitioner was less than eleven years of age.

was a conscientious objector to war (R. 34). Thereafter, on October 16, 1943, petitioner filed the Special Form for Conscientious Objector with the local board (R. 49, 50–53) and with it filed a personal statement (R. 38–39) and an affidavit of K. K. Records, a company servant of the North Unit—Houston, Texas, Company of Jehovah Witnesses, dated October 12, 1943 (R. 48–49), both of which were designed to support petitioner's claim to classification in IV–D as a minister of religion.

On October 28, 1943, the local board by unanimous vote classified petitioner I–A–O (conscientious objector available for noncombatant military service) (R. 36, 16). Thereafter, on November 11, 1943, petitioner made a statement to the board urging his reclassification to IV–D (R. 54–56). A minute entry on his questionnaire states "11–11–43 Reviewed and retained in IA" (R. 36, 42, 44, 100–101, 122).[3] Petitioner ap-

[3] Contrary to petitioner's statement that he was originally so classified on October 28, 1943 (Pet. 8). In this connection the report of the Department of Justice Hearing Officer states (R. 42):

"On Registrant's DSS Form 40 it appears that by unanimous action of the Local Board registrant was put in Class I–A. In a memorandum found in the file under date of November 11, 1943, not signed by any member of the Local Board, it is stated that registrant was placed in Class IAO but desired said classification changed to IV–D, but that the facts did not warrant such a change. In another letter, dated November 12, 1942, Willie G. Dyer, Clerk of the Local Board No. 9, states that registrant was appealing from the IAO

pealed to his board of appeal and was unanimously classified I–A by that board on August 28, 1944 (R. 36, 100–101, 122), after the board had referred the matter to a Department of Justice Hearing Officer and received a report showing that petitioner would refuse a conscientious objector's classification and would accept only a classification as a minister of religion (R. 42, 44, 99–100). Petitioner was given a preinduction physical examination and on October 17, 1944, he was certified as physically fit for general military service.[4] On December 5, 1944, petitioner was ordered to report for induction on December 15, 1944 (R. 23).

On the morning of December 15, petitioner reported to his local board. It is clear from the record that petitioner never went from the draft board to the induction station despite the statement in the petition for a writ of certiorari (pp. 28–29) that—

> It is presumed that there was a regularity of administrative proceedings follow-

classification given by the Board on October 28, 1943. As near as the facts can be ascertained, this registrant was originally placed in IAO by the Local Board and registrant then appealed, but before the Appeal Board passed on the appeal the file was returned to the Local Board, which placed registrant in Class I–A because registrant declined to accept either a IAO classification or a IV–E classification as he claimed to be a minister and entitled to a IV–D classification.

[4] This information has been obtained from petitioner's selective service file.

ing the issuance of the order to report for induction and that the petitioner complied with Sections 623.21 and 633.22 and reached the point where he could be required to submit to induction, because unless he was ever ordered to submit to induction it cannot be said that he refused to submit to induction.

There is nothing in the record to dispute the statements of the various witnesses and the documents that petitioner refused to submit to induction and that he was duly accepted for training and service. It is at least enough evidence to warrant this Court in holding that the petitioner did precisely as did Estep and Smith.

It clearly appears from the record, however, that petitioner's refusal to be inducted was made at the draft board and that in view thereof, he was never sent to the induction center (see R. 17–18, 61, 68–69, 78; see also R. 85). At petitioner's request, an affidavit taken from his selective service file was introduced in evidence at the trial, which read as follows (R. 18):

HOUSTON, TEXAS,
*December 15, 1944.*

*To Whom it May Concern:*

This is to certify that Ralph Henry Cahoon, Jr., who was ordered to report for induction on December 15, 1944, at 8:00 o'clock, did present himself at this Board at the specified time.

He refused, however, to be inducted, for the reason that he has conscientious scruples against serving in the armed forces, and he claims exemption as a minister of the gospel.

HENRIETTA A. ROLLFING,
*Asst. Clerk, Local Board #9.*

There is nothing in the record or in petitioner's selective service file, which we have examined, to show that his acceptability for service was finally determined by the armed forces. To the contrary, as the Department's files confirm, he refused to proceed to the induction center where such a determination would have been made.

**ARGUMENT**

1. The first eight questions raised by the petition (Pet. 2–4) all go to the propriety of the action of the Selective Service boards in classifying petitioner I–A contrary to his claim that he should have been given a classification exempting him as a minister of religion. Relying upon the decision of this Court in the *Estep* and *Smith* cases, Nos. 292 and 66, O. T. 1945, decided February 4, 1946, petitioner argues that he had exhausted the administrative process to the point where in this criminal prosecution he could and did offer as a valid defense (1) that there was no factual basis for the classification given him with the result that the actions of the local and appeal boards were beyond their jurisdiction (Pet. 23–26), and (2) that the appeal board

denied him due process in considering information outside the record and basing its determination on a preconceived bias against Jehovah's Witnesses (Pet. 17–23).

While we believe that these contentions are without substance,[5] it is unnecessary, we submit, to give consideration to them here. Contrary to petitioner's assertions, he did in fact fail to exhaust all of the administrative steps and hence was not entitled to challenge the validity of the Selective Service action in this criminal proceeding. Petitioner clearly falls within the ruling in the *Falbo* case, 320 U. S. 549. In that case the registrant had been classified as a conscientious objector, passed a pre-induction physical examination, and was ordered to report for work of national importance. He failed to report. Since he still might have been rejected by the Civilian Public Service Camp to which he was assigned, this Court held that he had failed to exhaust his administrative remedies and was therefore foreclosed from challenging the classification in the criminal trial. This Court reaffirmed that decision in the *Estep* case (slip opinion, p. 7). The petitioner here is in a similar position. Although

[5] As appears from the opinion below on rehearing (R. 261–263), petitioner was given full opportunity in the trial court to support these contentions. In his charge to the jury, the trial judge instructed them that on the basis of the evidence so adduced, petitioner "did have before the Board a legal and constitutional hearing" (R. 221). The action of the trial court in this regard was approved by the court below (R. 262–263).

he had had a pre-induction physical examination, he did not report to the induction station and go through all of the administrative steps short of actual induction so as to bring himself within the *Estep* rule. The induction order on its face required him to report to the local board to be transported to the induction station for processing (R. 23). Because of his refusal at the local board to proceed further, he never reached the induction station or there underwent the processing—physical, mental, and otherwise—by which his acceptability to the armed forces might have been finally determined.[6] Compare the facts in *Estep* v. *United States, supra* (slip opinion, pp. 2–3). In fact, petitioner had gone through far less of the administrative process than had the petitioner in *United States* v. *Rinko,* 147 F. 2d 1 (C. C. A. 7), certiorari denied, 325 U. S. 851, rehearing denied, 325 U. S. 894. Rinko had reported to the induction station and had there undergone a part of the processing, but he withdrew from the processing before his final acceptability was determined by the Army.[7] Petitioner, like

[6] The induction order reads in part (R. 23):

"This local board will furnish transportation to an induction station. You will then be examined, and, if accepted for training and service, you will then be inducted into the land or naval forces.

"Persons reporting to the induction station in some instances may be rejected for physical or other reasons."

[7] For discussion of this point see pp. 5–6, 9–10 of our Brief in Opposition in the *Rinko* case, No. 1071, October Term, 1944.

Falbo, and more so than Rinko, had stopped short in the administrative process before it could be determined by processing at the induction station whether he was acceptable to the armed forces, and, therefore, he cannot in this proceeding challenge the validity of the Selective Service classification.

2. The only remaining question raised by the petition is whether a registrant's good faith belief that he should have been exempted as a minister of religion is a good defense to the charge that he knowingly, wilfully, and unlawfully refused to comply with the induction order (Pet. 4, 26–28). Section 11 of the Selective Training and Service Act (50 U. S. C. App. 311) makes it a criminal offense for any person charged with a duty under the Act or regulations "knowingly" to fail or neglect to perform that duty. There is no question that petitioner received the order of the local board and that he was aware of his duty to report to the local board for transportation to the induction center and to submit to induction. Nothing more was required to be shown. *Browder* v. *United States,* 312 U. S. 335, 340–342; *United States* v. *Illinois Central R. R. Co.,* 303 U. S. 239, 242–243; cf. *Falbo* v. *United States, supra.* And it is no defense that the offense knowingly and intentionally committed was not done with a

bad motive.[8] See *Gates* v. *United States,* 122 F. 2d 571, 575 (C. C. A. 10), certiorari denied, 314 U. S. 698. Hence, evidence that petitioner was motivated by religious beliefs or personal convictions that the duty was wrongfully imposed does not divest his failure to report and submit to induction of that quality of wilfulness required by the Act. It follows, therefore, that the trial judge was not in error in refusing petitioner's requested instruction (R. 222, 225–226) that his good faith belief vitiated guilt.

## CONCLUSION

The case involves merely the application of well established principles of law to the particular facts of the case, and presents no question requiring further review by this Court. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
*Solicitor General.*
THERON L. CAUDLE,
*Assistant Attorney General.*
ROBERT S. ERDAHL,
SHELDON E. BERNSTEIN,
*Attorneys.*

JULY 1946.

[8] Petitioner's argument that good faith belief that the order to report is invalid is like the situations where a selectee is prevented from reporting by illness, accident, etc. (Pet. 27), is a *non-sequitur*, since, in the latter cases, the failure is involuntary.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

# No. 183

□

RALPH HENRY CAHOON, JR., *Petitioner*

*v.*

UNITED STATES OF AMERICA *Respondent*

□

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## Petitioner's
## PETITION FOR REHEARING

HAYDEN C. COVINGTON
*Counsel for Petitioner*

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

## No. 183

□

RALPH HENRY CAHOON, JR., *Petitioner*

*v.*

UNITED STATES OF AMERICA *Respondent*

□

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## Petitioner's
## PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

Within time fixed by rules of court and the order enlarging the time, petitioner files and presents this his petition for rehearing. The court is requested to grant the same and order the petition for writ of certiorari granted.

## Grounds

ONE

This Court should have exercised its discretion and granted the writ for each and every one of the reasons stated in the petition for the writ.

TWO

Since denial of the writ of certiorari, the United States Circuit Court of Appeals for the Second Circuit has decided a case exactly like the case at bar. The decision of that court is in direct conflict with that of the court below in this case.

## Discussion and Reasons Supporting Petition

The court is respectfully referred to the petition for writ of certiorari. See pages 2-4, 14-15, 17-26. Moreover, the contention that the administrative remedies were not exhausted so as to entitle petitioner to challenge the validity of the draft board action in response to the indictment is fully discussed in petitioner's reply to the Government's brief in opposition. See the reply brief, pages 1-6.

The alleged failure of Cahoon to report to the induction station and there undergo physical examination is, at most, mere omission of an optional procedural step which, in a similar case, has been held by the Second Circuit Court to be unnecessary. In *United States ex rel. Kulick* v. *Kennedy*, decided by that court October 29, 1946, Judge Learned Hand said: "Moreover, although a number of the decisions could be explained upon the ground that those inducted had not wholly exhausted their administrative remedies; in a number of others they had done so; and no distinction had been established between the two. Indeed, in *United States* v. *Flakowicz, supra* (146 F. 2d 874), *which had been one of these, the Supreme Court* denied certiorari only a fortnight before May 12th." (Italics added)

Also, in *United States* v. *Balogh*, the Second Circuit

Court of Appeals decided on October 31, 1946, that Balogh was improperly convicted because of the illegality of the draft board determination on facts identical with the facts in this case. Balogh refused to report. There, as here, the ground asserted for refusal to comply with the order was that the draft board denied procedural due process. In that case, as well as in this, the draft board considered the opinions and recommendations of other persons outside the draft board record in arriving at the determination. In the *Balogh* case recommendation of the Theological Panel was considered, while in this case the board considered a book purchased by one of the members of the board of appeal. In that case, as well as in this case, the draft board denied the claim for exemption, thereby denying a full and fair hearing, because all of Jehovah's witnesses considered themselves to be ministers. In the *Balogh* case, Judge Learned Hand said:

"The precise issue was whether the local and appeal boards had given him a fair hearing."

"For these reasons, which the 'Panel' further amplified, it was 'necessary to disregard entirely the use of the word, "minister," by the registrant and by other members of his sect; and to study whether he has been set apart from his fellows for special duties and functions' which 'are those of a minister as that word is intended by Congress.'"

"At the conclusion of his testimony the board again found against him, the chairman of the board, who had done most of the examining addressing him as follows: 'Your contention is untrue that the reason why there are no members of Jehovah's Witnesses in the armed forces is that they keep themselves apart from the world. They don't keep themselves apart from the world any more than you do—so how could you say you would be serving man by entering the Army or Navy. All that you are interested in is evading the service of your country.'"

"The concluding remarks of the chairman of the local board show that he at least did not understand his duties in the spirit of these directions. [Opinion No. 14, Selective Service National Headquarters, quoted by Judge Hand "in extenso in the margin" of his opinion.] He was condemning Jehovah's Witnesses as a whole, when he said that all that 'you are interested in is evading the service of your country'. Had this been a conclusion addressed to Balogh individually, the result of an impartial appraisal of his personal refusal, it might indeed have been immune from attack in the courts. It was not; it was a conclusion denying the exemption to Balogh because of his membership, and not professing to detect him personally as a sham. We should for that reason hesitate to accept the denial of the exemption, made as it was in that humor, even if the record were otherwise without flaw; but it is not. On the contrary the report of the 'Panel' independently invalidated the board's proceedings under our decision in *United States ex rel. Levy* v. *Cain* [149 Fed. (2) 338]. We there reversed the board for two reasons: first, because the 'Panel' was anonymous, and second, because its report invaded the board's functions, and we could not tell how far it had influenced the decision. . . . As the case comes to us, the board made use of evidence of which Balogh may have been unaware, and which he had no chance to answer: a prime requirement of any fair hearing."

"Besides, there was not the slightest excuse for sending the case to a 'Panel' so constituted. As we have said, the record does not tell us, except for the names, who were the three gentlemen who made it up; but even though they were Protestant ministers, they could have no proper part in an inquiry involving Jehovah's Witnesses. . . . So in the case at bar 'Headquarters' might have referred the case to a panel, especially acquainted with the practices of Jehovah's Witnesses, for an opinion whether in accordance

with these, Balogh would be recognized as a 'regular minister'. But the actual 'Panel' had no such competence, and did not assume to have; it did all it could do, it construed the statute. Finally, it was to the last degree ingenuous to expect any light from such a panel, which, to act at all, had first to divest itself of those ingrained habits of mind inevitable in any calling; and to bring a completely detached judgment to a heterodox creed."

For the reasons that the Second Circuit Court reversed the judgment in the *Balogh* case, this court should grant the writ of certiorari here. Indeed, the decision in the *Balogh* case should at least convince this Court that a substantial question is raised in this case which ought to be reviewed by this court.

## Conclusion

WHEREFORE, petitioner prays, as in his petition for the writ of certiorari, that the writ be granted, that the cause be set down for argument and submission, and that the judgment of the court below be reversed and the prosecution dismissed or, in the alternative, a new trial be ordered.

Respectfully submitted,

HAYDEN C. COVINGTON
*Counsel for Petitioner*

## Certificate

The undersigned counsel for petitioner hereby certifies that the foregoing petition for rehearing is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

HAYDEN C. COVINGTON
*Counsel for Petitioner*

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SUPREME COURT OF THE UNITED STATES

October Term, 1964

# No. 183

RALPH HENRY CAHOON, JR., *Petitioner*

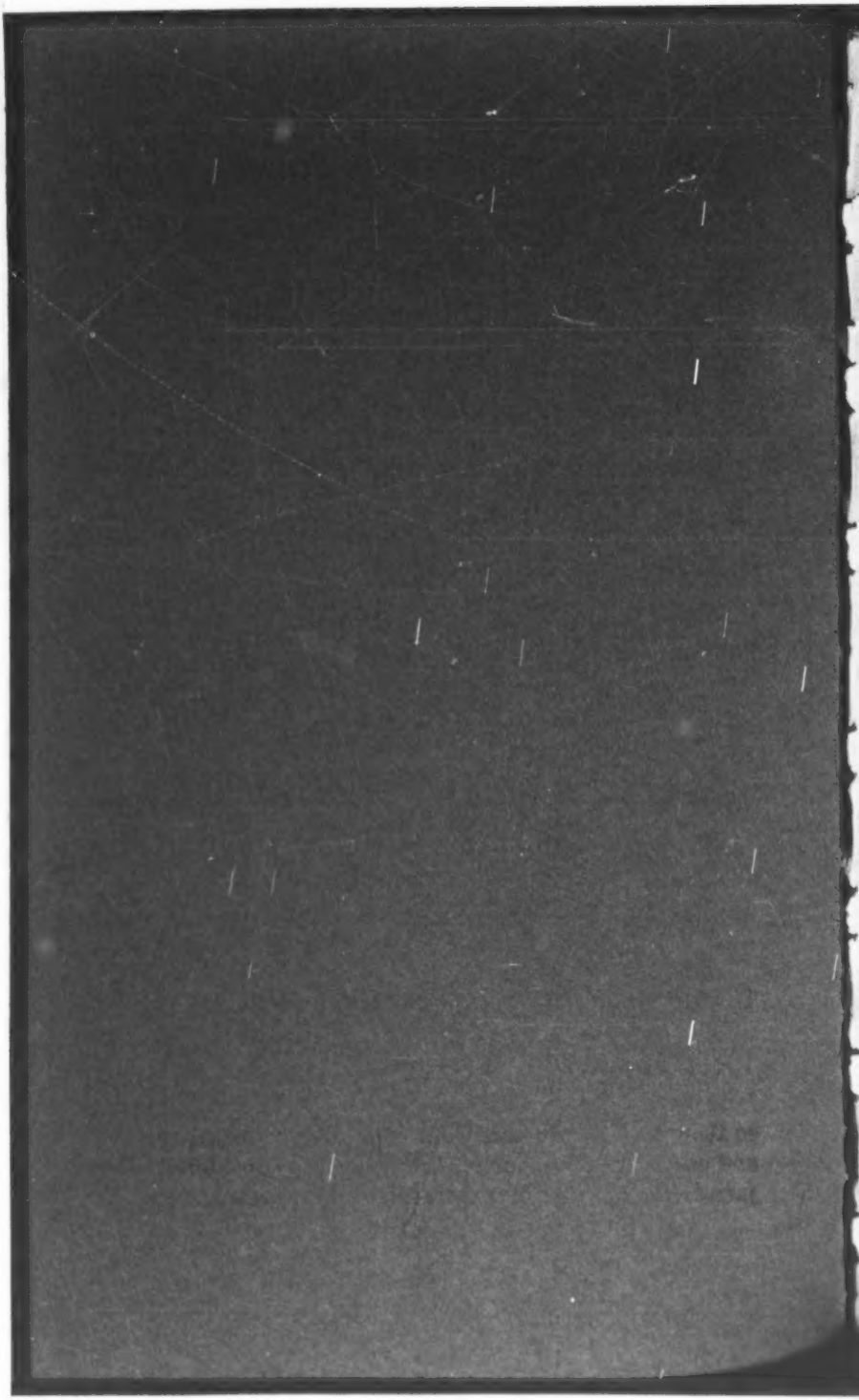
v.

UNITED STATES OF AMERICA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## Petitioner's
## MOTION FOR LEAVE TO FILE OUT OF TIME
## Second Petition for Rehearing
## and for Recall of Mandate
## to Enable this Court to Reconsider Its Judgment
## *together with*
## SECOND PETITION FOR REHEARING

HAYDEN C. COVINGTON
*Counsel for Petitioner*



# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

**No. 183**

□

RALPH HENRY CAHOON, JR., *Petitioner*
*v.*
UNITED STATES OF AMERICA, *Respondent*

□

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## Petitioner's
## MOTION FOR LEAVE TO FILE OUT OF TIME
## Second Petition for Rehearing
## and for Recall of Mandate
## to Enable this Court to Reconsider Its Judgment

TO THE SUPREME COURT OF THE UNITED STATES:

May it please the Court, Ralph Henry Cahoon, Jr., presents his motion for leave to file out of time a *Second Petition for Rehearing* and for a recall of the mandate so that the order of this Court denying certiorari rendered and entered on October 14, 1946, can be reconsidered before jurisdiction is lost by expiration of the present term.

The petition for rehearing attached hereto makes it clear that the administrative selective process in the *Cahoon* case had been completed prior to the issuance of the order to report for induction.

WHEREFORE petitioner prays that this Court exercise its discretion and grant him leave to file the attached *Second Petition for Rehearing* and that the mandate issued to the lower courts be recalled, and that upon consideration the petition be granted and that the order heretofore rendered be vacated. Petitioner prays for such other and further relief to which he may show himself justly entitled in the premises.

RALPH HENRY CAHOON, JR.
*Petitioner*

By HAYDEN C. COVINGTON
*Counsel for Petitioner*

## Certificate

The undersigned counsel for petitioner hereby certifies that the foregoing motion for leave to file the *Second Petition for Rehearing* is prepared and filed in good faith so that justice may be done, and not for purpose of delay.

HAYDEN C. COVINGTON
*Counsel for Petitioner*

## SECOND PETITION FOR REHEARING

Comes now the petitioner, with leave of court first having been asked and obtained, and presents his second petition for rehearing, asking that the order overruling his petition for rehearing be vacated and the order denying certiorari theretofore entered be set aside, and shows as grounds:

That the Court erred in failing to hold that petitioner had exhausted all his administrative remedies when by the local board he had been found acceptable upon a preinduction physical examination and was accepted within ninety days prior to issuance of the order to report for military service, thereby qualifying him, under the rule announced by the Court in *Falbo* v. *United States*, 320 U. S. 549, *Estep and Smith* v. *United States*, 327 U. S. 114, *Dodez and Gibson* v. *United States*, 67 S. Ct. 301, for judicial review of the illegality of his classification in defense to the indictment.

## OTHER GROUNDS

Cahoon was accepted upon a preinduction physical examination within ninety days from the date he was ordered to report for induction. The Brief for the United States in Opposition to the petition for writ of certiorari in this case states that Cahoon "was given a preinduction physical examination and on October 17, 1944, he was certified as physically fit for general military service.* On December 5, 1944, petitioner was ordered to report for induction on December 15, 1944 (R. 23)." (*Cahoon* v. *United States,* No. 183, October Term, 1946, Brief for the United States in Opposition, p. 5)

There is no question that the acceptance of Cahoon upon the preinduction physical examination exhausted his administrative remedies. The acceptance would have been acceptable to the armed forces because the preinduction physical examination was within ninety days before the date that petitioner was ordered to report for induction. See Petition for Writ of Certiorari, No. 800, October Term, 1946, *United States* v. *Balogh,* filed by the Government, pp. 13-18. Also reference is made to respondent's petition for rehearing in No. 800, October Term, 1946, *United States* v. *Balogh,* pp. 1-19.

For each and every one of the reasons discussed by Cahoon in his petition for writ of certiorari, his reply to the brief in opposition, his petition for rehearing and for the reasons appearing in respondent's petition for rehearing in *United States* v. *Balogh,* No. 800, October Term, 1946, petitioner asserts that the order denying the writ of certiorari should be vacated and, upon consideration hereof, the writ of certiorari granted.

* "This information has been obtained from petitioner's selective service file." *Ibid.*

## Conclusion

WHEREFORE, petitioner prays, as in his petition for the writ of certiorari, that the writ be granted, that the cause be set down for argument and submission, and that the judgment of the court below be reversed and the prosecution dismissed or, in the alternative, a new trial be ordered.

Respectfully submitted,

HAYDEN C. COVINGTON
*Counsel for Petitioner*

## Certificate

The undersigned counsel for petitioner hereby certifies that the foregoing second petition for rehearing is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

HAYDEN C. COVINGTON
*Counsel for Petitioner*